



ARIZONA SUPREME COURT ORAL ARGUMENT CASE SUMMARY



**ARIZONA SUPREME COURT
ADMINISTRATIVE OFFICE OF THE COURTS
1501 West Washington - Phoenix Arizona 85007- 3231
Public Information Office: (602) 542-9310**

Case: State v. Montaño, CR 99-0439-AP

Parties: Appellant: Danny Montaño, defendant, represented by the Law Offices of Carla G. Ryan Appellee: State of Arizona, represented by Janet Napolitano, Kent Cattani, and Jack Roberts of the Office of the Attorney General.

Facts:

Appellant was convicted of one count of murder in the first degree and one count of conspiracy to commit murder in the first degree. He was sentenced to death on the murder count and to life without possibility of parole for 25 years on the conspiracy count. The sentences are to be served concurrently.

Appellant and David Jimenez shared cell 4 at the Cimmarron Unit of the Department of Corrections in Tucson. Part of each day there is "open pod," a period during which inmates can leave their cells and interact. According to trial testimony, appellant and his cellmate, Jimenez, entered Raymond Jackson's cell during open pod on August 7, 1995. Appellant asked "What's happening?" and closed the door. Loud noises and screams were then heard. When appellant and Jimenez exited, a concentrated clean-up effort ensued involving those two and at least one other inmate. Shortly thereafter, a guard making rounds found Mr. Jackson face-down on his bunk and covered with a sheet. He had been stabbed 179 times.

The prison was immediately locked down, and a search of the cell shared by appellant and Jimenez revealed bloodstains on the floor and a bag of bloodstained clothing.

Appellant had a fresh, bleeding cut on the back of his right hand. While four "shank"-type weapons were found in the cellblock, including two in a drain in the porter's closet, none was ever linked to appellant.

Two years passed before a complaint was sworn out against appellant and Jimenez. A preliminary hearing was held at which three inmates testified: David Gallardo Soto, Jose Alcaez-Lopez, and George Bidwell. The state requested this hearing, in part, to preserve the testimony of these men, who it feared might be killed before they could testify at trial. George Bidwell testified both at the preliminary hearing and at trial. By the time of the trial, both Soto and Alcaez-Lopez had been released from custody and were living in Mexico. Upon the state's motion and following a hearing on the matter, they were deemed "unavailable" for the trial. The videotape of their preliminary hearing testimony was played to the jury.

After the presentencing hearing, the trial court found that the state had proven the

existence of four aggravating circumstances and that the appellant had proven none of the statutorily-enumerated mitigators and three of the non-enumerated factors. She did not give the latter any mitigating weight.

Issues:

- I. Whether the state intentionally delayed filing charges to ensure that Mr. Soto and Mr. Alcaarez-Lopez had been released and deported. Appellant claims that this delay prejudiced him by denying his right to rigorous cross-examination. In addition, he argues that he was harmed by the inability to argue the effect of the delay to the jury.
- II. Whether appellant's constitutional right to confront witnesses was violated by the admission of videotaped testimony in his trial. Second, he claims that witness Soto's statements regarding a conversation he overheard were hearsay and improperly admitted. Further, he argues that the trial court erred in allowing the state to solicit gang-related testimony.
- III. Whether the refusal to unseal and disclose a packet of sealed documents prepared by Jimenez in connection with his defense violated the confrontation clause and denied appellant due process under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194.
- IV. Whether the excusal of some prospective jurors after the death qualification of the jury and the voir dire violated appellant's Sixth Amendment rights.
- V. Whether the trial court erred when it found that the aggravating factors outweighed the mitigation factors and when it imposed the death sentence.
 - A. Whether the state proved beyond reasonable doubt that the murder was especially cruel.
 - B. Whether the trial court "double counted" his prior convictions in violation of the Sixth Amendment's due process and the Eighth Amendment's prohibition of cruel and unusual punishment.
 - C. Whether the trial judge properly weighed the aggravating factors.
 - D. Whether the trial court properly considered the mitigating factors and evidence offered by defendant.
- VI. Whether there was sufficient evidence on both counts to convict appellant.

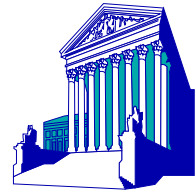
- VII. Whether the judge abused his discretion in deciding to admit photos of the victim's body.
- VII. Whether the trial court erred in ordering that the nature of prior convictions of witness Mr. Bidwell should be kept out.
- VIII. Whether the DNA evidence is unreliable.
- IX. Whether the prosecution failed to act in good faith in this case.

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Wednesday, February 13, 2002



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Case: No. CV-01-0262-PR
Twin City Fire Ins. Co. v. Hon. Edward Burke,
General Star Indemnity Co. and General Star Management Co.,

Parties and Counsel:

Petitioner: Twin City Fire Ins. Co. represented by Neil Wake and Linda Skon, Law Offices of Neil Wake and Garrick Gallagher, Steven Leach and Eileen Sigmund, Sanders & Parks

Respondent: General Star Indemnity Co. and General Star Management Co. represented by W. Michael Flood, John Egbert and David Earl, Jennings, Strouss & Salmon

Facts

This litigation arises from an automobile accident where a driver hit and killed an 11-year old boy, Kipp Turner. General Star was the primary insurer and Twin City the excess carrier for Arizona Pipeline (AP), a subcontractor for Southwest Gas. Southwest was an additional insured.

AP was trenching for Southwest, which caused a diversion of pedestrians into the street. Turner was walking in the roadway with his father when the driver hit and killed Turner. Turner's parents later sued a number of defendants, including the alleged driver, Southwest and AP. The parents settled with all defendants except Southwest and AP. General Star handled the defense and Twin City hired private counsel to monitor the defense. Twin City sent General Star two letters stating it had its attorney review the case, understood the plaintiffs were willing to settle for less than the primary policy limits and demanded General Star settle the case within the primary limits. General Star did not settle and the jury awarded each parent \$4 million and allocated 25% of the fault to alleged driver and 75% to Southwest/AP. The case was settled on appeal. General Star paid most of its \$1 million policy. Twin City paid \$3.4 million.

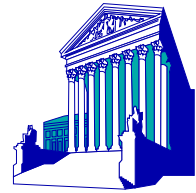
Seeking reimbursement for its payment of the excess judgment, Twin City sued General Star, contending General Star had in bad faith failed to settle the case within the primary limits. General Star alleged Twin City, which had monitored the case's progress, was contributorily or comparatively negligent and guilty of unclean hands.

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Case: No. CV-01-0311-SA State of Arizona v. Hon. Steven D. Sheldon and Hon. Michael K. Carroll (Heather A. Hentges, et al., Real Parties in Interest).

Parties and Counsel:

Petitioner: State of Arizona, represented by Assistant Phoenix City Prosecutors L. Beth Barnes, Samuel K. Lesley and Paul W. Badalucco.

Respondents/Real Parties in Action: Over 600 real parties in interest were charged with offenses of driving under the influence of alcohol, or DUI. Representing these parties for this oral argument are Richard M. Gerry, Christopher G. McBride, Martin G. McAuliffe and Michael J. Dew.

Facts:

Phoenix City Court Magistrate Michael K. Carroll entered an order suppressing breath test results in 1,371 DUI cases that he consolidated for hearing. Approximately 660 of those cases are involved in this special action.

The parties stipulated to certain facts for the purposes of hearing, and both sides presented testimony of witnesses and other evidence. The magistrate was interested in two issues:

1. Did the failure of the **Phoenix Crime Lab ["PCL"]** and **Department of Public Safety ["DPS"]** to keep and disclose all records relating to the function and accuracy of the Intoxilyzer 5000 breath-testing instruments, after the implementation of **ADAMS [Alcohol Data Acquisition Management System]**, deny defendants due process by depriving them of a meaningful way to challenge breath test results?
2. Did the changes in the State's record-keeping procedures, before and after the implementation of ADAMS, coupled with the failure to disclose those changes to defendants, constitute bad faith?

Specifically, the magistrate considered whether the electronically stored breath testing records disclosed to defendants from the years January 1996 to July 23, 1999 were sufficient to let them challenge the accuracy of the State's breath test results.

ADAMS is a computerized record system that replaced a paper recording system

formerly used by police in DUI investigations. All the real parties in interest performed breath tests on machines using the ADAMS system. By law, records of periodic calibration checks and function and accuracy checks that operators perform on Intoxilyzer 5000 breath testing machines must be kept, as well as the results of tests of a defendant's breath that the State will use as evidence. Defendants are entitled to know the information contained in those records so they can challenge the accuracy of the breath test results to be used against them.

When ADAMS was put into place in 1996, police officers stopped making the handwritten checklists or Intoxilyzer-generated print cards for these tests that had been disclosed routinely to defendants. When ADAMS was upgraded by a computer chip change ("EPROM") in October 1997, the program no longer kept in the database the records of each "sub-step" of quality assurance checks that also had been disclosed. Only the calibration test made right before the final "pass" or "fail" was kept in ADAMS.

Certain data from the ADAMS database was compiled on a system called Arizona Criminal Justice Information System, or ACJIS. ACJIS information was available to prosecutors and was disclosed to defendants. In early 1999, it became apparent that ADAMS contained more information than was available from ACJIS. The State eventually provided all ADAMS information to defendants in paper records and on several CDs. The disclosure included something called a "BFMLOGG", which contained all original ADAMS data, even though entries had been manipulated or deleted elsewhere. The State made this information available before the hearing on the real parties' motions to suppress.

In his order suppressing evidence, the magistrate said the quality assurance program PCL followed did not violate regulations adopted by the director of Department of Health Services governing testing procedures, but the undisclosed data would have been meaningful to defendants in their defense and should have been disclosed.

He determined that suppression of test results was warranted because records were routinely changed, moved, not retained, and in some cases deleted from ADAMS and ACJIS (Arizona Criminal Justice Information System). This means that numerical breath test results may not be used in these 660 criminal trials. The magistrate also said the State's conduct did not justify dismissal of DUI charges against defendants because there was no showing that the conduct constituted bad faith.

Maricopa County Superior Court Judge Steven D. Sheldon affirmed the suppression order. The State filed a petition for special action with the court of appeals, which declined jurisdiction. *State v. Hon. Steven D. Sheldon, et al. (Hentges)*, 1 CA-SA 01-0146 (8/7/01). The State then filed this petition for special action with the Arizona Supreme Court.

Issues Presented in this Petition for Special Action:

“I. Where no prejudice is shown to a party before the court, can a due process suppression sanction be applied?

“II. Does due process require DUI suspects to be automatically and immediately provided with all available breath test instrument information?

“III. Were the parties here deprived of the minimal requirements of due process where they possessed, before trial, more breath test information than was ever previously available, and the procedures used improved the accuracy and reliability of their breath test results?”

The real parties in interest say the issue presented is:

“Whether, either by acceptance of defense expert testimony or on the basis of stipulated facts, the lower courts erred in determining that the ability to challenge calibration and operator errors on the Intoxilyzer 5000, ‘however slight,’ was constitutionally sanctioned *impeachment material* that was unlawfully withheld from Real Parties.”

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